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Before the  
Federal Communications Commission  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of

1998 Biennial Regulatory Review  
Testing New Technology

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CC Docket No. 98-94

MCI  
REPLY COMMENTS

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August 5, 1998

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## **I. Introduction**

As part of its Biennial Regulatory Review, the Commission asked parties to comment on whether and how it should use its Section 10 and Section 11 authority to modify its technology and market testing rules in order to promote technology and market testing.<sup>1</sup> Section 11 requires the Commission to determine whether any of its regulations are “...no longer in the public interest as the result of meaningful economic competition between providers of such service.”<sup>2</sup> Section 10 requires the Commission to determine that “forbearance from enforcing the provision or regulation will promote competitive market conditions....”<sup>3</sup> Consequently, in the context of reviewing its technology and market testing rules, the Commission must first determine whether competition is sufficiently developed to warrant relaxing or eliminating its technology and market testing rules.

Eight parties responded to the Commission’s Notice: 5 incumbent local exchange companies (USTA, US West, Ameritech, Bell Atlantic, Bell South, GTE, SBC); 2 new entrants (MCI, Intermedia), an equipment manufacturer (Lucent), and a wireless provider (Airtouch). No party maintains there is meaningful local competition today. Nevertheless, the incumbent local exchange carriers (ILECs) propose eliminating the Commission’s technology and market testing rules. The ILECs fail to provide any evidence that forbearing or relaxing from these rules

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<sup>1</sup>“Specifically, this Notice seeks comment about various initiatives the Commission could undertake in order to promote technology testing, including use of our deregulatory power pursuant to new section 11 of the Communications Act and, alternatively, by applying the Commission’s forbearance authority pursuant to new section 10 of the Communications Act.” In the Matter of Biennial Regulatory Review — Testing New Technology, CC Docket No. 98-94, released June 11, 1998 at ¶ 2.

<sup>2</sup>47 U.S.C. § 11(a)(2).

<sup>3</sup>47 U.S.C. §10(b).

will promote competition. The Commission must therefore reject all ILEC proposals. Only MCI and Intermedia follow Congress' direction to evaluate the Commission's rules in light of their effect on the development of competition.

MCI strongly urges the Commission to modify its marketing and technology testing rules to promote competitive entry and competitive development of new services and technologies. The Commission should extend the flexibility to test and market services it has already granted ILECs to CLECs. New entrants agree that competition will be strengthened if the Commission permits new entrants to participate in marketing and technical trials initiated by the ILECs.<sup>4</sup> Permitting competitive local exchange carriers (CLECs) to initiate their own market and technical trials using components of ILEC networks (which may or may not be tariffed) would also promote competition and rapid development of innovative services.

## **II. ILEC Proposals to Forbear from All Rules That Might Affect New Services Are Not in the Public Interest**

ILECs propose two radical measures to encourage ILEC deployment of new services: A) forbearing from all technology and market testing rules; and B) forbearing from price cap, cost allocation, unbundling, separate subsidiary, and long-distance entry requirement rules currently applied to new ILEC services. The Commission should reject both measures.

- A. ILEC bottleneck control remains as much of a barrier to competition as when the Commission adopted its technology and market testing rules
  - 1. The Commission's market and technology testing rules reject the argument that limited trials alone prevent ILECs from exercising market power for new services

The Commission's marketing and technology testing rules waive full CEI requirements for marketing and technology trials, on condition that the trials were of limited scale, did not

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<sup>4</sup>Intermedia at 5; MCI at 8.

exceed 8 months; and met other minimal network disclosure and cost allocation requirements.<sup>5</sup>

ILECs now argue that the limited nature of market and technology trials, of itself, prevents them from exercising market power for services that have not been introduced. They conclude that the Commission should forbear from its technology and market testing rules. For example, USTA proposes the Commission eliminate:

- filing requirements prior to technology or market trials;
- pricing, time, and tariff requirements for services being tested;
- requirements ensuring that shareholders bear the cost of the trial; and
- issuing a network disclosure statement when testing interfaces.<sup>6</sup>

However, when the Commission adopted its market and technology testing rules it concluded that the limited nature of trials, *only in conjunction with its rules*, would prevent ILECs from exercising market power for services that have not been introduced.<sup>7</sup> The example of Southern Bell's (SBT) marketing and promotion of its voice messaging service in Georgia, "MemoryCall," provides a clear example that the limited nature of a market or technical trial is not sufficient to prevent ILECs from exercising market power. The Georgia PSC found that SBT actively sold MemoryCall to telephone answering service (TAS) bureau customers who called SBT to order call forwarding and other custom calling features in preparation for signing on with

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<sup>5</sup>"We are confident that the BOCs will not benefit from any undue competitive advantage by virtue of running the trials in the absence of full CEI safeguards due to the limited nature of the trials *and* the following conditions, which are generalizations of the conditions discussed above for SWBT's gateway trial..." (emphasis added). In the Matter of BOC Notices of Compliance with CEI Waiver Requirements for Market Trials of Enhanced Services, *Market and Technology Testing Rules*, CC Docket No. 88-616, 4 FCC Rcd 1271; 1989.

<sup>6</sup>USTA Comments at 4-6. See also, Bell Atlantic at 5; Bell South 5; GTE at 4; and SBC at 1.

<sup>7</sup>*Market and Technology Testing Rules* at ¶ 46.

a TAS bureau.<sup>8</sup> This Commission agreed that these call back, or unhooking, practices by SBT were anticompetitive, and that SBT engaged in unfair and discriminatory marketing of its messaging service during the market trial period.<sup>9</sup>

2. ILECs fail to provide any evidence that forbearing from or relaxing its technology and market testing rules will promote competition

ILECs argue that as long as the trial does not affect existing services of competitors, there can be no competitive harm, even if there are no tariff requirements; cost allocation requirements; and network disclosure requirements for trials.<sup>10</sup> The standard the ILECs propose — “forbearing if services currently offered by competitors are not harmed” — is weaker than the Congressional standard of “forbearing if doing so promotes competition.” Section 11 requires the Commission to determine whether any of its regulations are “...no longer in the public interest as the result of meaningful economic competition between providers of such service.”<sup>11</sup> Section 10 requires the Commission to determine that “forbearance from enforcing the provision

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<sup>8</sup>Public Utilities Reports, Fourth Series, Georgia, Re: Southern Bell Telephone and Telegraph, Docket No.4000-U, *Georgia PSC VMS Decision*, Georgia Public Service Commission, 123 P.U.R. 4<sup>th</sup> 83, May 21, 1991, at 39.

<sup>9</sup>Report and Order, In the Matter of Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, CC Docket No. 90-623 6 FCC Rcd 7619, November 21, 1991. The Georgia PSC halted SBT’s market trial, and imposed a structurally separate subsidiary requirement on SBT’s provision of voice messaging services. This Commission found that the Georgia PSC did not have jurisdiction to preempt its non-structural separations requirements. However, the Commission did not dispute the Georgia PSC’s conclusion that SBT’s market test was anticompetitive.

<sup>10</sup>SBC maintains that the Commission need not forbear from its technology and market testing rules, since these rules apply to services that are not common carrier telecommunications services. Nevertheless, SBC proposes that the Commission eliminate its technology and market testing rules. SBC probably meant to say that the Commission need not exercise its Section 10 authority in order to forbear from enforcing these rules.

<sup>11</sup>47 U.S.C. § 11(a)(2).

or regulation will promote competitive market conditions...”<sup>12</sup> Consequently, in the context of reviewing its technology and market testing rules, the Commission must first determine whether competition is sufficiently developed to warrant relaxing or eliminating its technology and market testing rules. ILECs have completely failed to provide evidence that forbearing from its market and technology testing rules will promote competitive entry. Consequently, their requests for forbearance must be rejected on these grounds.

B. ILECs do not believe that eliminating technology and market testing rules will improve their delivery of new services

ILECs admit that the Commission’s technology and market testing rules have a minor impact on their incentives to introduce new services and technologies. For example:

...only deregulation...across the entire breadth of activities comprising new service development, testing, introduction and deployment, will expedite the availability of new services and technologies to all Americans.<sup>13</sup>

Without appropriate incentives and opportunities in place for the actual introduction of new services, however, flexible trial rules will have little bearing on carriers’ decisions or abilities to pursue services based on new technologies.<sup>14</sup>

These arguments support MCI’s contention that with the advent of the advanced intelligent network (AIN), it has become easier for ILECs to test new technologies.<sup>15</sup> These arguments also undermine earlier ILEC arguments supporting further relaxation of technology and testing rules to promote ILEC provision of new services. If it is true that CEI, cost allocation, separate subsidiary, price cap, unbundling, and other major rules are the predominant determinants of

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<sup>12</sup>47 U.S.C. §10(b).

<sup>13</sup>Ameritech Comments at 3.

<sup>14</sup>Bell South at 2.

<sup>15</sup>MCI Comments at 5.

ILEC deployment of new services, then there is no need to change the Commission's technology and market testing rules (at least as they pertain to ILECs), since ILECs' real incentives to test and market are determined elsewhere. If the Commission finds that more incentives are needed to introduce new services, and reduces 251, 271, and other ILEC obligations, these larger modifications will be sufficient and there is no need to modify its technology and market testing rules. On the other hand, if the Commission finds that additional incentives are not needed to introduce new ILEC services, there is no need to modify its technology and market testing rules.<sup>16</sup>

**III. The Commission Should Modify its Testing Rules so that New Entrants Gain Timely Access to ILEC Network Features That Have Not Been Tariffed**

Currently, CLECs wishing to use ILEC network features that are not tariffed must either wait for them to be tariffed, wait for the ILEC to use these features in a test, or go through a long, extended struggle within standards bodies controlled by their competitors. Affidavits submitted in MCI's Comments testify to the decade-long delay competitive LECs and ISPs have faced in their attempt to gain access to AIN trigger points.<sup>17</sup>

Southern Bell's introduction of voice messaging service in Georgia provides another example that neither the Commission's network change notification rules, nor its testing rules requiring equal access to basic services used in an ILEC trial, permit competitors to independently test new services or capabilities, thereby placing them at a serious competitive disadvantage. Prior to the introduction of voice messaging services by Southern Bell, TAS bureaus provided answering services that utilized direct inward dial technology provided by the

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<sup>16</sup>MCI's Comments documented the extensive steps the Commission has already taken to reduce regulatory requirements attached to the provision of new ILEC services, and that further relaxation outside the context of technology and market testing are not needed. See, MCI Comments at 2-4.

<sup>17</sup>See Guggina Affidavits, Attachments 2 and 3, MCI Comments.

ILEC. The voice messaging services offered by Southern Bell differed technically from, and were superior to, the services offered by their competitors, being based on the capabilities inherent in common channel signaling (SS7) technology. The Georgia PSC found that SS7 capabilities were available in Southern Bell's service territory in the early 1980s, but Southern Bell refused to make these network features available to their competitors until Southern Bell tariffed its competing answering service — MemoryCall, nearly a decade later.<sup>18</sup>

The MemoryCall case highlights the failure of the Commission's current testing rules to make ILEC network features available to competitors so they may test services and technologies they are developing. New entrants are limited to services ILECs have tariffed, either as part of the ILEC trial, or as part of a regular ILEC tariff offering. Competitors requesting non-tariffed network features for trials would be responsible for compensating ILECs for documented additional costs imposed by the trial. Competitors' trials making use of non-tariffed ILEC facilities should also be subject to the same duration and customer notification rules that apply to ILEC trials.

## **V. Conclusion**

The burden of proof is on those seeking forbearance to show that competition has developed sufficiently to replace the existing market and technology testing rules — yet the record is silent on this question. Thus, the Commission may not forbear from these rules as they

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<sup>18</sup>“The evidence in this Docket indicates that the network features necessary for the TAS Bureaus to offer their VMS options on a basis competitive in quality and availability to SBT's current offering of MemoryCall nSM service, has existed since at least the early 1980s....The record is also clear that SBT chose not to unbundle the features and offer them on the network on an unbundled basis until SBT was prepared to offer MemoryCall nSM service....The Commission finds this evidence disturbing enough because of its indication that SBT may have improperly impeded development of the VMS market for almost a decade.” *Georgia PSC VMS Decision* at 39.



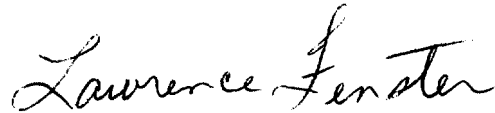
apply to ILEC provision of new services.

Ever since the Commission adopted its marketing and technology testing rules, it has strongly supported the view that technology and market testing is a crucial aspect of innovation. To date, the Commission has promoted technology and market testing exclusively with ILEC services in mind. Now that competitive entrants are interested in making a broad array of innovative local services available to diverse end-users, it is time to encourage CLECs to test the interfaces, for CLEC technology and services that make use of ILEC facilities.

A new period of technical change is upon the communications industry — the period of user-driven innovation. Flexible access to the ILEC networks will ensure that competition will emerge to meet a diversity of user needs. It is impossible to predict either what the value-generating new uses of information technologies will be, or what optimum network and market structures are necessary to deliver them to users. In these circumstances, it is incumbent upon the Commission to adopt policies that favor testing of services by new entrants as they make use of ILEC networks. Doing so will create a mechanism for the discovery of answers that are more likely to be right over time, without the need for policy-makers to predict outcomes or to be omniscient.

The record shows that the Commission's existing technology and market testing rules do not permit new entrants to undertake independent trials using ILEC network features that have not been tariffed. The Commission should therefore extend the flexibility to test and market it has already granted ILECs to CLECs.

Respectfully submitted,  
MCI TELECOMMUNICATIONS CORPORATION

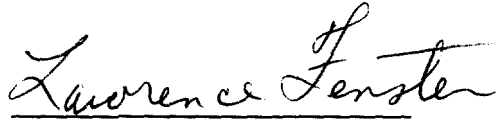
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August 5, 1998

Lawrence Fenster

## **STATEMENT OF VERIFICATION**

I have read the foregoing and, to the best of my knowledge, information and belief, there is good ground to support it, and it is not interposed for delay. I verify under penalty of perjury that the foregoing is true and correct. Executed on August, 5, 1998.

A handwritten signature in cursive script, reading "Lawrence Fenster", written in black ink. The signature is fluid and stylized, with a horizontal line drawn underneath the name.

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## Service List

I, Barbara Nowlin, do hereby certify that a copy of the foregoing **Comments** has been sent by United States first class mail, postage prepaid, hand delivery, to the following parties on this 5<sup>th</sup> day of August 5, 1998.

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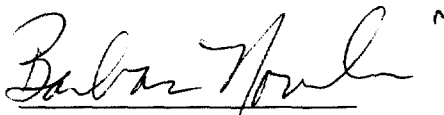
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A handwritten signature in cursive script, appearing to read "Barbara Nowlin", written over a horizontal line.

Barbara Nowlin  
August 5, 1998